WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Law Enforcement Digest

May 2001

HONOR ROLL

525th Session, Basic Law Enforcement Academy – November 13th, 2000 through March 26th, 2001

President: Robert DeGabriele - Lynnwood Police Department
Best Overall: Brian R. Jorgensen - Lynnwood Police Department
Best Academic: Brian R. Jorgensen - Lynnwood Police Department
Best Firearms: Joshua K. Kelsey - Lynnwood Police Department
Tac Officer: Officer Rob Scholl - Kent Police Department

Correction notice regarding the Honor Roll for the 524th Session, Basic Law Enforcement Academy: The "Best Overall" for the 524th BLEA session was **Troy E. Conner**, King County Sheriff's Office; the officer listed in April 2001 LED as "Best Overall" was actually 2nd best overall in the class.

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LAW ENFORCEMENT MEDAL OF HONOR CEREMONY SET FOR MAY 18, 2001

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's ceremony will take place Friday, May 18, 2001 at the St. Martin's College Pavilion, 5300 Pacific Avenue S.E. in Lacey, Washington, commencing at 1:00 PM. This is the last day of Law Enforcement Week across the nation.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve.

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NINTH CIRCUIT, U.S. COURT OF APPEALS

PUBLIC DISCLOSURE OF ABORTION PROVIDERS' NAMES AND ADDRESSES - THROUGH POSTERS AND ON THE INTERNET - PROTECTED BY FIRST AMENDMENT - In Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists, ___ F.3d ___, 2001 WL 293260 (9th Cir. March 28, 2001), the Ninth Circuit Court of Appeals holds that anti-abortion activists' actions in publicly disclosing the names and addresses of abortion providers, through posters and on an Internet website, and offering rewards to individuals who were able, through non-violent means, to stop the providers from continuing to provide abortions, were protected by the First Amendment. The Ninth Circuit rules that the actions were protected "free speech" because the actions could not be construed as direct threats that the activists or their agents would physically harm providers who did not stop providing abortions.

The following facts are excerpted from the Ninth Circuit opinion:

> During a 1995 meeting called to mark the anniversary of Roe v. Wade, 410 U.S. 113 (1973), the American Coalition of Life Activists (ACLA) unveiled a poster listing the names and addresses of the "Deadly Dozen," a group of doctors who perform abortions. In large print, the poster declared them guilty of "crimes against humanity" and offered $5,000 for information leading to the "arrest, conviction and revocation of license to practice medicine." The poster was later

published in an affiliated magazine, Life Advocate, and distributed at ACLA events.

Later that year, in front of the St. Louis federal courthouse, ACLA presented a second poster, this time targeting Dr. Robert Crist. The poster accused Crist of crimes against humanity and various acts of medical malpractice, including a botched abortion that caused the death of a woman. Like the Deadly Dozen List, the poster included Crist's home and work addresses, and in addition, featured his photograph. The poster offered $500 to "any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines" (which prohibit violence).

In January 1996, at its next Roe anniversary event, ACLA unveiled a series of dossiers it had compiled on doctors, clinic employees, politicians, judges and other abortion rights supporters. ACLA dubbed these the "Nuremberg Files," and announced that it had collected the pictures, addresses and other information in the files so that Nuremberg-like war crimes trials could be conducted in "perfectly legal courts once the tide of this nation's opinion turns against the wanton slaughter of God's children." ACLA sent hard copies of the files to Neal Horsley, an anti-abortion activist, who posted the information on a website. The website listed the names of doctors and others who provide or support abortion and called on visitors to supply additional names. *[Footnote 2 – In addition to plaintiffs, the Nuremberg Files website identifies dozens of clinic employees and public figures as abortion supporters (and future war crimes defendants), including six current members of the Supreme Court, Bill Clinton, Al Gore, Janet Reno, Jack Kevorkian, C. Everett Koop, Mary Tyler Moore, Whoopi Goldberg and, for reasons unknown, Retired Justice Byron White. See Roe, 410 U.S. at 221 (White, J., dissenting).*] The website marked the names of those already victimized by anti-abortion terrorists, striking through the names of those who had been murdered and graying out the names of the wounded. Although ACLA's name originally appeared on the website, Horsley removed it after the initiation of this lawsuit.

Neither the posters nor the website contained any explicit threats against the doctors. But the doctors knew that similar posters prepared by others had preceded clinic violence in the past. By publishing the names and addresses, ACLA robbed the doctors of their anonymity and gave violent anti-abortion activists the information to find them. The doctors responded to this unwelcome attention by donning bulletproof vests, drawing the curtains on the windows of their homes and accepting the protection of U.S. Marshals.

[Footnote omitted]

Some of the doctors filed a civil lawsuit in federal district court in Oregon alleging violations of various state and federal laws. A jury returned a large verdict in favor of the doctors.

The Ninth Circuit has now reversed. The Court acknowledges that the First Amendment does not protect speech that "authorizes, ratifies, or directly threatens violence." It does, however, protect speech that encourages others to commit violence, unless the speech is capable of "producing imminent lawless action." The Ninth Circuit concludes that if the "First Amendment protects speech advocating violence, then it must also protect speech that does not advocate violence but still makes it more likely." The Court explains: "[t]he jury would be entitled to hold defendants liable if it understood the statements as expressing their intention to assault the doctors but not if it understood the statements as merely encouraging or making it more likely that others would do so."

The Ninth Circuit relies heavily on the United States Supreme Court's decision in NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), holding under the following analysis that the

actions of the activists could not be construed as a direct threat and were thus protected by the First Amendment.

> [In Claiborne,] a group of white-owned businesses sued the NAACP and others who organized a civil rights boycott against the stores. To give the boycott teeth, activists wearing black hats stood outside the stores and wrote down the names of black patrons.
>
> After these names were read aloud at meetings and published in a newspaper, sporadic acts of violence were committed against the persons and property of those on the list. At one public rally, Charles Evers, a boycott organizer, threatened that boycott breakers would be "disciplined" and warned that the sheriff could not protect them at night. At another rally, Evers stated, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." The Mississippi courts held the boycott organizers liable based on Evers's statements and the activities of the black-hatted activists.
>
> The [United States] Supreme Court acknowledged that Evers's statements could be interpreted as inviting violent retaliation, "or at least as intending to create a fear of violence whether or not improper discipline was specifically intended." Nevertheless, it held that the statements were protected because there was insufficient evidence that Evers had "authorized, ratified, or directly threatened acts of violence." Nor was publication of the boycott violators' names a sufficient basis for liability, even though collecting and publishing the names contributed to the atmosphere of intimidation that had harmed plaintiffs. . . .

[Citations omitted]

The Planned Parenthood Court looks first to the words used, noting "that none of the statements ACLA is accused of making mention violence at all. While pungent, even highly offensive, ACLA's statements carefully avoid threatening the doctors with harm 'in the sense that there are no 'quotable quotes' calling for violence against the targeted providers.'" [Citation omitted].

The Ninth Circuit next looks to the context in which the words were used, noting that the statements not only failed to threaten violence by the defendants, but also failed to mention future violence at all. The Court also finds it significant that the statements were made in a public arena, rather than by direct personal communication. The Court explains that statements that may be hyperbole in a public speech might be understood as a threat if communicated directly to the person threatened. Additionally, "speech made through the normal channels of group communication, and concerning matters of public policy, is given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment." [Citations omitted]

The Ninth Circuit concludes that:

> If Charles Evers's speech was protected by the First Amendment, then ACLA's speech is also protected. Like Evers, ACLA did not communicate privately with its targets; the statements were made in public fora. And, while ACLA named its targets, it said nothing about planning to harm them; indeed, it did not even call on others to do so. This stands in contrast to the words of Charles Evers, who explicitly warned his targets that they would suffer broken necks and other physical harm. Under the standard of Claiborne Hardware, the jury's verdict cannot stand.

[Citations omitted]

Result: Reversal of Oregon Federal District Court judgment on jury verdict awarding $107 million in actual and punitive damages against the activists.

LED EDITORIAL NOTE: The state law tort claims of the targeted doctors were abandoned before trial and were, therefore, not before the Ninth Circuit on appeal. Additionally, the personal information posted by the anti-abortion activists included only names and addresses, and did not include social security numbers, credit histories, or additional types of personal information.

The March 28th, 2001 Ninth Circuit opinion may be accessed on the Internet at: [http://www.ce9.uscourts.gov/web/newopinions.nsf/].

We are aware of the website that lists the names, addresses, telephone numbers, social security numbers, and other personal information of some Washington criminal justice personnel. The Washington Attorney General's Office, in conjunction with other law enforcement agencies, is continuing to monitor the situation and discuss our options. If you have specific questions or concerns about the website, please contact your agency's legal advisor.

The Washington Attorney General's Office has included information regarding identity theft on its website at http://www.wa.gov/ago/clearinghouse/consumer. Click on the link to "Identity Theft" and you will find helpful information compiled by the Federal Trade Commission regarding identity theft and steps you can take to help protect yourself.

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WASHINGTON STATE COURT OF APPEALS

THREE SEARCH RULINGS IN SEX MOLESTER CASE: (1) FERRIER CONSENT ARGUMENT REJECTED BECAUSE CASE NOT "KNOCK-AND-TALK"; BUT SEARCH WARRANT DECLARED PARTIALLY UNSUPPORTED UNDER THEIN ANALYSIS; AND (3) COURT MAKES "PLAIN VIEW" RULING ADVERSE TO STATE ON VIDEOTAPE-WATCHING

State v. Johnson (Larry E.), 104 Wn. App. 489 (Div. II, 2001)

Facts and Proceedings Below: (Excerpted from Court of Appeals opinion)

> In late October 1997, sisters CL and DL, ages 8 and 10, alleged that Johnson had sexually abused them while they were visiting in his apartment. CL said that on at least three occasions Johnson had massaged her genital area with a "long" vibrating massager that had "an 'on button' on the handle" and a "round thingy on the end with green bumps on it." DL said that on at least one occasion Johnson had digitally penetrated her vagina, and that she had seen the massager described by CL. Neither girl said anything about writings, tapes, or objects other than the massager. A physician examined each girl and found physical symptoms consistent with sexual abuse and inconsistent with accident.
>
> On December 3, 1997, [a detective] requested a warrant to search Johnson's home for the massager and other items. She based her request on the girls' statements as described above, and on the following assertions:
>
> > I have been a detective assigned to the Child Abuse Intervention Center since April 1992. In that capacity I have investigated over 400 child abuse cases and have received 350 plus hours of training specifically related to child sexual abuse.
> >
> > Through my training and experience, I have learned that adults who are sexually attracted to or sexually involved with children use sexually explicit materials ... for lowering the inhibitions of children, sexually

> stimulating children and themselves, and for demonstrating the desired sexual acts before, during, and after sexual activity with children. Further, they often use sexual aids such as dildoes fashioned after a man's penis of various sizes and shapes, in addition to other sexual aids, such as a massager, in the seduction of their victims.... Those materials are treated as prize possessions. They often maintain diaries of their sexual encounters with children. These accounts of their sexual experiences are used as a means of reliving the encounter when the offender has no children to molest. Such diaries might consist of a notebook, scraps of paper, or a formal diary. Depending on the resources available to the offender, they may be contained on audio tape or computer entries in a "home computer."

Also on December 3, the Clark County District Court issued the requested warrant. It authorized a search of Johnson's apartment for [items described in the affidavit].

[Officers went to Johnson's home] in plain clothes. One knocked, and Johnson came to the door. [One detective] said they were police officers who "needed to talk to him about some allegations of sexual contact with children [,]" and they "wondered if he would agree to speak with" them. She did not tell him they had a warrant.

Johnson invited them into the living room, where they advised him of his Miranda rights. He waived those rights, and they questioned him for about an hour. During that time, he voluntarily produced and displayed a vibrating massager matching the one described by CL and DL. At first, he said he had used the massager on the girls' "back, tummy, legs, or things like that." Later, he said he had used the massager for sexual contact, but not for penetration.

At about 10:35 a.m., [one detective] told Johnson he would be arrested. She also said they would like to search the apartment. She asked "if that would be okay with him or if he would rather we have a search warrant, that it was totally his choice." Johnson responded, "Search away[,]" and at 10:38 a.m. signed a consent-to-search form.

During the next five or ten minutes, a patrol officer and two more detectives arrived at the apartment. [The detective] told Johnson that the two detectives were there to help search the apartment, and Johnson said "that would be okay." The patrol officer took Johnson to jail.

At 10:56 a.m., detectives started searching the apartment. In Johnson's bedroom, according to [the detective], they found:

> One unmarked video tape. This video tape was placed into the VCR to view while we were there. After a few short moments of what appeared to be general T.V., the tape turned black, then focused on a small girl sleeping on what appeared to be a couch. As the focus went wide angle and close-up on the face of the child, the child appeared to be approximately ten to twelve years of age.... This panned to a child's genitalia being exposed, the underwear removed to the side, the legs spread apart. As the video progressed, what appeared to be a male hand began massaging and fondling the child's genital area.... This particular scene ended, more pornography continued with ... what appeared to be an adult female, [and] the tape ended once again with regular T.V.

> In a hall closet, there was another video tape found on the tape shelf. This video tape was also unmarked. When placed into the VCR, again, there appeared to be regular T.V. and then spliced into it was the same scene as we had earlier seen with the child being fondled by what appeared to be an adult male hand.
>
> The second videotape was a copy of the first, and neither showed CL or DL.

At 2:50 p.m., the officers finished their search of the apartment. They seized as evidence the two videotapes with fondling scene, the vibrating massager, and many other items. Only the two videotapes were later admitted at trial.

After finishing at the apartment, [the detectives] went to the county jail, where they again advised Johnson of his Miranda rights. He indicated he was willing to talk and signed another Miranda waiver form. When asked about the videotape with the sleeping child, he said he had made the tape about ten years earlier; that he did not remember the child's name; and that the adult male hand was his.

The State charged Johnson with unlawfully possessing pictures of a minor engaged in sexually explicit conduct. The State based the charge on RCW 9.68A.070 and the two videotapes. RCW 9.68A.070 provides that "[a] person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a Class C felony."

Johnson moved to suppress the two videotapes. He argued in part that the affidavit for the warrant did not show probable cause to seize or view the videotapes, and that his consent had been obtained in violation of State v. Ferrier. He concluded that the police had seized and viewed the videotapes without justification.

The trial court denied the motion to suppress. It reasoned that Ferrier did not apply in a situation of this kind, and that Johnson had voluntarily consented to a search of his apartment. It agreed with Johnson, however, that the affidavit for the warrant did not show probable cause to seize or view the tapes.

The trial court held a bench trial on stipulated facts at which it admitted the two videotapes. It found Johnson guilty [and] sentenced him to 320 days in jail.

ISSUES AND RULINGS: 1) Under State v. Thein, 138 Wn.2d 133 (1999) **Aug. 99 LED:15**, was the detective's affidavit in support of the search warrant sufficient to establish probable cause to seize anything other than the massager, where the affidavit's justification for seizing other items relied entirely on the detective's experience and training? (ANSWER: No, the affidavit does not meet Thein analysis as to items other than the massager); 2) Assuming the search warrant affidavit didn't justify seizing items other than the massager, were the videotapes that the officers seized and viewed on-site in "plain view"? (ANSWER: No, the "plain view" rule does not allow investigatory search of an item -- in this case, the viewing of the contents of the videotapes -- to determine whether there is probable cause to seize it); 3) Where police have already gotten a search warrant, may they seek and obtain valid consent to search without advising the consenting party that they have a search warrant that they reasonably believe would separately justify the search? (ANSWER: Yes, and the consent here was broad enough in scope to permit, among other things, the viewing of the videotapes); 4) Were police required to give Ferrier warnings in requesting consent to search Johnson's apartment? (ANSWER: No, because this was not a "knock-and-talk" operation)

Result: Affirmance of Clark County Superior Court conviction of Larry Edward Johnson for possessing videotapes of minors engaged in sexually explicit conduct (in violation of RCW 9.68A.070).

ANALYSIS:

1) Thein Probable Cause Problem

In State v. Thein, 138 Wn.2d 133 (1999) **Aug 99 LED:15**, the Washington Supreme Court found a search warrant affidavit insufficient to search a residence of a suspected drug-dealer. The Thein Court assumed for the sake of analysis that the affidavit there established that the target had made one sale of a substantial quantity of marijuana. However, the affidavit provided no information linking the target's activities to his residence. The Thein Court held that the officer-affiant could not establish the necessary PC link to the target's residence merely by stating that the officer's experience and training was that drug-dealers routinely keep certain items (inventory, paraphernalia, records, weapons ,etc.) at their residences.

Based on Thein, the Johnson Court concludes that the detective's affidavit did not establish PC to search for anything other than the described massager. The Johnson Court explains:

> In the case now before us, the affidavit for the search warrant contained probable cause to believe that Johnson had committed child rape or child molestation; that a vibrating massager was evidence of the crimes; and that the massager would probably be found in his home. The affidavit did not contain probable cause to believe that the other listed items (e.g., magazines, books, movies, photographs, correspondence, diaries, tape recordings, sexual aids other than the massager) constituted evidence of the crimes. Nor did it contain probable cause to believe that the other listed items would probably be found in his home. On the contrary, as to items other than the massager, it contained only "general statements regarding the common habits of" child abusers, which are "not alone sufficient to establish probable cause." Assuming without holding that the warrant authorized the police to search for and seize the massager, it did not authorize the police to search for, seize, or view the two videotapes.

[Citations and footnotes omitted]

2) "Plain View"

The Johnson Court assumes the warrant was legally severable, and that the officers were therefore lawfully present under the warrant on the premises to search for the massager. The Court then explains as follows that the videotapes could not lawfully be searched under the "plain view" doctrine:

> The plain view doctrine allows officers to seize an item, without a warrant, if, while acting in the scope of an otherwise authorized search, they acquire probable cause to believe the item is evidence of a crime. The doctrine does not allow an additional, unauthorized search, a restriction usually expressed by saying that the officers must have "immediate knowledge ... they [have] incriminating evidence before them."
>
> Arizona v. Hicks, 480 U.S. 321 (1987) **May 87 LED:04** and State v. Murray, 94 Wn.2d 527 (1974) exemplify cases in which officers conduct an additional unauthorized search. In each of those cases, officers were lawfully in the defendant's home. They saw an item that they suspected was stolen (a stereo in Hicks, a TV in Murray), but they lacked probable cause to believe it was stolen. To acquire probable cause, they moved the item until its serial number became

visible; copied the serial number; and compared the serial number to their stolen property reports. The plain view doctrine did not justify their conduct because when they first saw the item they lacked "immediate knowledge" (probable cause to believe) that the item was evidence; and when they moved the item to acquire probable cause, they conducted an additional unauthorized search.

Ross v. Maryland [a 1983 Maryland state court decision] applied these principles to a videotape. A juvenile claimed he had been invited into the defendant's bedroom, shown pornographic magazines, and molested. The police obtained and served a warrant to search the defendant's home for the magazines. During the search, the police came across a video cassette recorder and nine videotapes. As here, the exterior of the tapes did not indicate that the tapes might be evidence of a crime. Nonetheless, the police inserted one of the tapes into the recorder, viewed it, and discovered child pornography. The plain view doctrine did not justify their conduct because when they came across the videotape they did not have immediate knowledge (probable cause to believe) it was evidence of a crime; and when they viewed it to acquire probable cause, they engaged in an additional unauthorized search.

This case is like Hicks, Murray, and Ross, assuming the warrant was severable. [The detectives] were in possession of the massager before they saw the videotapes in issue here; but even if they were not, they could not reasonably have thought they would find a massager inside a videotape. When they first saw the tapes, nothing about the exterior of the tapes gave probable cause to believe the tapes were evidence of a crime. To acquire probable cause, they needed to view the tapes' contents, and doing that was an additional unauthorized search. Even if the warrant was severable, so that it authorized a search for the massager, it has no bearing on the seizure and viewing of the videotapes.

3) Consent Request By Officers With Search Warrant

Turning to the consent issues, the Johnson Court rejects in the following analysis defendant's argument that the officers were required to reveal that they had a warrant. When they asked him for consent to search:

> Johnson argues that his consent was vitiated because the officers did not reveal they already had a warrant. An officer serving a search warrant is not required to seek consent to enter, but he or she is permitted to do so in order to minimize violence, protect privacy, and prevent property damage. When necessary to accomplish these goals, an officer may even lie to obtain consent. The officers here were permitted to seek consent, and the fact they had a warrant did not affect consent so long as consent was otherwise voluntary.

4) Ferrier's Inapplicability To Consent Issue

Finally, the Johnson Court rejects the defendant's argument that his consent was invalid under State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02** (requiring in "knock and talk" searches explicit warnings of the right to refuse, right to restrict scope and the right to retract). The Johnson Court explains:

> The issue here is whether Ferrier applies, as opposed to whether Ferrier was met. If Ferrier applies, it was not met, for the officers failed to advise Johnson of his right to limit consent and of his right to revoke consent. Their failure is understandable, for they were acting on December 4, 1997 and Ferrier was not decided until August 27, 1998.

> The Washington Supreme Court has "limited Ferrier to the kind of coercive searches the police employed there." Accordingly, it applies only to situations in which the police employ a "knock-and-talk" procedure, which the Supreme Court has defined as follows:
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> > In a "knock-and-talk" procedure, not having obtained a warrant, police officers proceed to premises where they believe contraband will be found. Once there they knock on the door and talk with the resident, asking if they may enter. After being allowed to enter, the officers then explain why they are there, that they have no search warrant, and ask permission to search the premises.
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> This limitation on Ferrier has several specific effects. In State v. Williams 142 U.S. 17 (2000) **Dec. 2000 LED:14** and State v. Bustamante-Davila 138 Wn.2d 964 (1999) **Nov. 99 LED:02** the Supreme Court held that Ferrier does not apply when officers have an arrest warrant or in good faith believe they have an arrest warrant. In the same two cases, the court stated in dictum that Ferrier does not apply when officers have a search warrant.
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> In this case, the officers went to Johnson's home with probable cause to arrest; in contrast to the officers in Ferrier, they were not pursuing unverified information from an informant who was not known to be reliable. They had a search warrant, issued by a neutral and detached magistrate, even though it later turned out to be wholly or partially invalid. There is no finding that they knew the search warrant was wholly or partially invalid, or that they were acting in bad faith. Indeed, they appear to have been acting in good faith, for they scrupulously advised Johnson of his right to refuse consent and--several times--of his Miranda rights. We conclude that Ferrier does not apply under these circumstances; that Johnson's consent was voluntary and thus valid; and that the motion to suppress was rightly denied.

[Citations and footnotes omitted]

THEIN PC ISSUE RESOLVED AGAINST STATE IN BURGLAR'S CHALLENGE TO SEARCH WARRANT FOR HIS HOME; BUT COURT MAKES PRO-STATE RULINGS ON ISSUES RE CITIZEN-INFORMANT CREDIBILITY, AND RE MIRANDA-INITIATION-OF-CONTACT

State v. McReynolds, 104 Wn. App. 560 (Div. III, 2001)

Facts and Proceedings Below:

Officers caught Randy Del McReynolds and some other men in the act of burglarizing a construction site. At the scene, the officers found a pry bar which had been reported stolen a month earlier in a burglary from another construction site.

Based primarily on this information, the officers obtained a warrant to search the residence of one of the men. This first search warrant authorized a search of the suspect's dwelling and of a detached garage-storage area for items taken in the earlier construction site burglary. In executing that first warrant, the officers also searched a separate detached outbuilding not designated in the warrant; in that part of the search, they seized several items they believed to be stolen.

Based in part on information they learned in the execution of the first warrant, officers obtained further warrants to search other property of the suspects; suspected stolen property was found in those searches. Officers also learned from a storage facility owner that, after the burglary arrest, Randy Del and Amy Jo McReynolds had loaded items out of a storage locker into a U-

Haul truck. Officers obtained a warrant to search the U-Haul truck; that search yielded further items believed to be stolen. While looking for the truck, officers interrogated Amy Jo in her driveway. She made some admissions of guilt, and she consented to vehicle searches that turned up items that she admitted were stolen.

Randy Del and Amy Jo McReynolds were charged with numerous counts on various charges. The Court of Appeals notes that the trial court suppressed evidence seized in the outbuilding not designated in the first search warrant. The trial court otherwise denied the suppression motions of the defendants. Ultimately, as the Court of Appeals opinion explains:

> A jury found Randy McReynolds guilty of three counts of first degree possession of stolen property, six counts of second degree possession of stolen property, two counts of third degree possession of stolen property, and three counts each of possession of a stolen firearm and first degree unlawful possession of a firearm. The jury found Amy Jo McReynolds guilty of three counts of first degree possession of stolen property and six counts of second degree possession of stolen property.

ISSUES AND RULINGS: 1) Where a burglar is caught in the act and at that time has in his possession one tool reported stolen in a prior unsolved burglary, do these two facts, without more, establish probable cause to search the burglar's residence for other items believed stolen in the prior unsolved burglary? (ANSWER: No, under State v. Thein, 138 Wn. 2d 133 (1999) **Aug 99 LED:15**, more evidence linking the residence to the missing property is required); 2) Where an affidavit for a subsequent search warrant identifies an uninvolved citizen informant as the owner of a storage locker facility but does not name the informant, does the affidavit establish the facility owner's credibility for probable cause purposes? (ANSWER: Yes, but questions remain as to the extent of the taint of the illegality of the search under the first warrant, and those questions must be addressed on remand of the case to the trial court); 3) Where a suspect initially asserts her right to counsel after being given Miranda warnings preparatory to custodial interrogation, but she then waives her rights of her own volition after talking privately to a personal friend, is the waiver of Miranda rights valid? (ANSWER: Yes, because the suspect here re-initiated contact with the officers and indicated her desire to engage in the interrogation).

Result: Reversal of Stevens County Superior Court's decision that Warrant #1 was lawful and remand to determine the extent of the taint of that unlawful search; reversal of multiple convictions of Randy Del and Amy Jo McReynolds; analysis rendered as well on a sentencing issue not addressed in this **LED** entry.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) PC - Thein Issue Re First Warrant

> [P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.
>
> In [State v. Thein, 138 Wn.2d 133 (1999) **Aug 99 LED:15**], the court rejected an argument that the necessary nexus is established when there is evidence a person is engaged in drug dealing and the person resides in the place to be searched.
>
> However, the Thein Court observed that "the existence of probable cause is to be evaluated on a case-by-case basis." In a footnote, the [Thein] court noted that "[u]nder specific circumstances it may be reasonable to infer such items will likely be kept where the person lives." The court's reference to the LaFave treatise

[the leading text surveying search & seizure law] is helpful in light of the following passage:

> Another situation in which this problem arises is when the crime in question was a theft, burglary or robbery in which valuable property was obtained by the perpetrator. Here, the question is whether, assuming a not too long passage of time since the crime, it is proper to infer that the criminal would have the fruits of his crime in his residence, vehicle or place of business. Perhaps because stolen property is not inherently incriminating in the same way as narcotics and because it is usually not as readily concealable in other possible hiding places as a small stash of drugs, courts have been more willing to assume that such property will be found at the residence of the thief, burglar or robber. It is commonly said that in such circumstances account may be taken of "the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property." It is most relevant, therefore, that the objects are "the sort of materials that one would expect to be hidden at [the offender's] place of residence, both because of their value and bulk," and also that the offender "had ample opportunity to make a trip home to hide" the stolen property before his apprehension.

This language suggests a more limited reading of the Thein holding, requiring that the court carefully examine the officer's affidavit to determine whether it establishes a reasonable inference that evidence of criminal activity could be found at the Aladdin Road residence.

Because the officers found Eugene McReynolds and Leonard Wolf at the scene of the burglary and Randy McReynolds and Jeffery Sears nearby, there is no likelihood the fruits of that crime would be at the property where all of the men lived. The question therefore is whether there is a basis for inferring evidence of other crimes would be at the Aladdin Road property. **The only possible evidence is the presence at the scene of a pry bar inscribed with the initials "E.A.," which allegedly had been stolen along with a large quantity of other tools several weeks earlier. But the presence of this tool, without more, does not establish an inference that evidence of the earlier burglary or any other crime would be at the Aladdin Road property.** The result is that, as in Thein, the affidavit failed to establish a nexus between the crimes of which the residents were accused and their residence. Warrant 1 thus was issued unlawfully. The superior court erred in admitting the fruits of the unlawful search. *[LED EDITORIAL NOTE: Before going on to address other issues, the Court of Appeals declares at this point in the opinion that the Court is remanding the case to allow the trial court to determine the taint of the illegal search under the first warrant.]*

[LED EDITORIAL COMMENT ON PC RULING: The State Supreme Court's ruling in Thein did not command that common sense be abandoned, or at least we hope not. Under our reading of the facts in McReynolds, we cannot accept the conclusory holding in McReynolds bolded in the preceding paragraph. We think that where, as here, a burglar is one of several burglars caught red-handed at a construction site with a burglar-tool stolen in a construction-site burglary that occurred a month earlier, and police know that a large quantity of other construction tools were taken in the prior burglary, common sense leads to a determination that some of the other tools and other stolen items are presently being stored at the burglar's residence. But beware. Until the Washington

Courts sort out the limits of Thein in relation to application of common sense, officers should proceed more cautiously and thoroughly than ever in marshalling facts to support search warrants.

2) PC Based On Unnamed But Identifiable Citizen-Informant

[T]he McReynoldses contend Warrant 5 was invalid because of the following statement:

> [Officers] also received information . . . that Randy McReynolds had rented a storage unit, believed to be near the Auto View Drive Inn [sic], between Colville and Kettle Falls, and further that he may be getting ready to leave the area this p.m., possibly in possession of additional stolen property.

The McReynoldses contend this statement failed to satisfy the Aguilar-Spinelli test. When an informant's tip provides the basis for probable cause to issue a search warrant, the warrant affidavit must establish both the basis of the knowledge and the credibility of the informant.

Alternatively, the substance of the tip may be corroborated by independent police investigation. If supported by this independent corroboration, the tip must be as trustworthy as a tip that itself would satisfy the Aguilar-Spinelli test.

Here, the unattributed statement quoted above satisfies neither prong of the Aguilar-Spinelli test. However, the very next paragraph of the affidavit demonstrates the officers independently corroborated the tip:

> [The officer] called the owner of the Storage Unit and asked if the McReynolds[es] had in fact rented a unit at that location. [The officer] was advised that Randy McReynolds had rented a unit, and further was advised that Randy McReynolds and his wife Amy Jo had been out to the unit on this date with a U-Haul truck and had cleaned it out, stating they were moving to Deer Park.

The source of this added information was himself an informant. As owner of the storage unit, there was a clear basis for his information. The remaining issue is whether he was credible. He was not truly anonymous, because the information in the affidavit made him readily identifiable. More significantly, this citizen informant provided his information in "entirely unsuspicious circumstances," a fact that supports his credibility.

The anonymous tip thus was corroborated by independent police investigation. This additional information itself satisfied the Aguilar-Spinelli test. The informants' statements did not render Warrant 5 invalid.

3) Miranda “Initiation Of Contact” Issue

[T]he McReynoldses contend the officers violated Amy Jo McReynolds' Miranda rights by continuing the interrogation after she asserted her right to remain silent. Police interrogation must stop when a person asserts her Miranda rights unless the person "initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477 (1981) **[See article on “Initiation of Contact” on the CJTC LED Webpage at [http://www.wa.gov/cjt/led/ledpage.html]**. A person may be found to have waived the right if she "freely and selectively responds to police questioning after

initially asserting Miranda rights." Here, the court found that Amy Jo McReynolds initially asserted her right to remain silent but later changed her mind after consulting with Donna Sears. This finding is supported by the testimony of both officers to the effect that Amy Jo McReynolds agreed to talk to the officers after speaking privately with Ms. Sears.

The court's findings, which are supported by substantial evidence, justify the conclusion that Amy Jo McReynolds validly waived her Miranda rights after speaking with Ms. Sears. The court did not err in concluding the statements were admissible.

[Text, citations, and footnotes omitted]

ENCLOSED GARAGE GETS PROTECTION AGAINST WARRANTLESS, NONCONSENTING POLICE ENTRY EVEN THOUGH: 1) GARAGE DOOR OPEN, 2) LOUD MUSIC PLAYING INSIDE, AND 3) RENTER DIRECTED OFFICER TO LOOK FOR RESIDENT IN GARAGE

State v. Dyreson, 104 Wn. App. 703 (Div. III, 2001)

Facts and Proceedings Below: (Excerpted from Court of Appeals opinion)

[A detective] went to the residence of appellants Wilma Dyreson, and Danny Austin to contact them regarding an unrelated police matter. [The detective] was unable to contact appellants at the house. A renter at the property told the detective to look in the shed/garage to see if appellants were there.

As [the detective] approached the garage, he heard loud music. Although [the detective] knocked on the open garage door and identified himself, he heard no response. [The detective] believed it might be difficult for someone inside the garage to hear him, so he entered the building through the open door.

[The detective] went about half way into the garage. He was unable to find appellants, but he saw marijuana in a tray near the back of the garage. He could not see the tray from the threshold of the building. [The detective] left the property and returned several days later with a search warrant and seized the marijuana.

The State charged appellants with one count of possessing marijuana. Appellants unsuccessfully moved to suppress the marijuana. After the court entered consistent findings of fact and conclusions of law, appellants were convicted following a stipulated facts trial.

ISSUE AND RULING: Did defendants have a constitutionally protected privacy right against the officer's warrantless, nonconsenting entry of their garage, despite the facts that: the garage door was open, loud music was playing in the garage, and a renter at the site had told the officer to look for the defendants in the garage? (ANSWER: Yes)

Result: Reversal of Spokane County Superior Court convictions of Wilma L. Dyreson and Danny Lee Austin for possessing marijuana.

ANALYSIS: (Excerpted from Court of Appeals opinion)

"An officer with legitimate business, when acting in the same manner as a reasonably respectful citizen, is permitted to enter the curtilage areas of a private residence which are impliedly open, such as access routes to the house." "However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied

invitation and intrude upon a constitutionally protected expectation of privacy. All parties agree the detective was initially engaged in legitimate police business.

Generally, areas of the curtilage impliedly open to the public include the driveway, walkway, or access route leading to the residence. State v. Hoke, 72 Wn. App. 869 (1994) **Jan. 95 LED:06**. But if a portion of the driveway is hidden from public view and does not lead directly to the house, it may fall outside the impliedly open areas of the curtilage. State v. Daugherty, 94 Wn.2d 263 (1980) **Nov. 80 LED:03** (resident had reasonable expectation of privacy in particular area of driveway depriving officer of lawful right to view interior of garage from threshold). The guiding principle is that a police officer on legitimate business may go where any "reasonably respectful citizen" may go.

No case in Washington exists holding that the exposed interior of a residential garage is impliedly open to the public. [Under the Tracht decision by a Minnesota court] a police officer may enter an open garage without a warrant to knock on a door connecting the garage to an attached house. But, because no such door exists here, any analogy to Tracht is inapt.

In sum, we conclude an open garage door does not impliedly open the curtilage to a reasonably respectful citizen. In other words, no reasonably respectful citizen would feel free to enter the garage without the owner's consent. Therefore, it follows that [the detective] left the impliedly open area of the curtilage once he crossed the threshold of the garage. Given this conclusion we turn to the next question of whether [the detective]'s departure infringed upon a constitutionally protected expectation of privacy.

[T]he officer's initial purpose of going to the garage was to locate Ms. Dyreson and Mr. Austin. This purpose could be accomplished by merely looking into the open garage to see if they were present. Thus, [the detective]'s intrusion was exploratory beyond that minimally necessary to accomplish his stated purpose. In other words, [the detective] intruded into a place where appellants had a reasonable expectation of privacy. Generally, the possessors of fully enclosed structures have a reasonable expectation of privacy in the contents of those structures.

Regarding garages, an appellate court in Illinois held that once a person opens the overhead door of his garage and exposes its interior to public view, he abandons any legitimate expectation of privacy in the garage, its contents, and his activities therein. But [the Illinois case law] does not stand for the proposition that one may go beyond a lawful vantage point to search inside a garage.

By leaving their garage door open, appellants merely lost their expectation of privacy in those objects and activities observable by a visitor who may be lawfully standing at the threshold. Here, [the detective] could not see the marijuana from the open doorway; thus his later observation could not support a warrant. If the detective had merely peered into the open garage from a lawful vantage point and seen contraband, then the State's argument would then be apt.

The State next argues that [the detective] reasonably relied on the instructions of the "renter" in entering the garage to contact the appellants. The State's contention is unpersuasive; the unchallenged finding of the trial court is that the renter told the detective "to go look in the shed." But looking into a building is not the same as crossing its threshold. Moreover, merely looking for the owner of the garage is not an accepted circumstance justifying a warrantless entry.

> The State next argues loud music made it reasonable for the detective to enter the building to contact the appellants. But one does not reasonably enter a residence merely because nobody answers the doorbell or a knock no matter whether loud music is playing or not. Here, crossing the garage threshold after knocking and calling out is no different. Thus, this argument is also unpersuasive.
>
> We conclude that the open view exception does not apply because [the detective]'s vantage point intruded on the appellants' reasonable expectation of privacy. Correspondingly, the "plain view" doctrine does not apply because the State cannot show [the detective] had a legally justifiable reason for being inside the garage in the first place.

[Some text and citations omitted]

LED EDITORIAL NOTE: Division Three's Dyreson ruling was under the Washington state constitution, article 1, section 7, as well as under the 4th Amendment of the U.S. Constitution. In U.S. v. Oaxaca, 233 F.3d 1154 (9th Cir. 2000), the Ninth Circuit of the U.S. Court of Appeals similarly found that the 4th Amendment protects against warrantless, nonconsenting police entry of enclosed garages, even where, as in Dyreson, the garage doors are wide open.

"COMMUNITY CARETAKING"/"EMERGENCY EXCEPTION" JUSTIFIES ENTRY OF MARIJUANA-SMOKING BABYSITTER'S RESIDENCE, AS WELL AS JUSTIFYING SUBSEQUENT NON-PRETEXTUAL SEARCH FOR HER IN BEDROOM

State v. Gibson, ___ Wn. App. ___ , 17 P.3d 635 (Div. II, 2001)

Facts and Proceedings Below: (Excerpted from Court of Appeals opinion)

> In April 1999, Officer Cowan and Sergeant Dieter responded to a report that Velvet Gibson was smoking marijuana at her home while she was babysitting. The officers knocked on Gibson's door, and she came out onto the porch and shut the door behind her. The officers saw a child inside the residence. According to Officer Cowan, Gibson appeared tired, her eyes were "droopy," and her pupils were dilated. Sergeant Dieter could smell both burnt and freshly harvested marijuana; he thought Gibson was under the influence of a controlled substance. Gibson admitted to the officers that she had been smoking marijuana. The officers entered the home after telling Gibson they were going in to ensure the children's safety.
>
> Gibson showed the officers to a back bedroom where they found marijuana smoking pipes and some marijuana. In another bedroom, they found an infant. After returning to the living room, the officers told Gibson they would cite her for marijuana possession. Officer Cowan suggested that Gibson should give them any additional drugs in the house so Child Protective Services would be more likely to let her keep her children. The officers told Gibson they would arrange for child care, and Sergeant Dieter began making these arrangements. Gibson was upset and wandering in and out of the living room.
>
> After Gibson had been away from the living room for three to five minutes, Officer Cowan became concerned. He stepped into the hallway and could see Gibson bent over in a bedroom with her hands out of view. Cowan thought Gibson was under the influence of marijuana and might have a weapon. He entered the bedroom and saw Gibson emptying marijuana from bags into a pile.

> Gibson moved to suppress all of the evidence. The trial court concluded that the officers' initial entry into the home was justified under the emergency exception because of their concern for the children's safety. But the trial court concluded that the exigency ended when the officers found the first batch of marijuana and secured the children. The court concluded that Officer Cowan had a legitimate concern for Gibson while she was away from the living room. But noting Officer Cowan's failure to call Gibson back to the living room before he went looking for her, the court ruled that "there was no exigency sufficient to justify ... following [her] down the hallway and into the bedroom."

ISSUE AND RULING: Were the officers justified under the "emergency exception" to the constitutional search warrant requirement in going inside the babysitter's residence to check on the children's wellbeing, as well as in subsequently going to a bedroom to check on the babysitter? (ANSWER: Yes)

Result: Affirmance of Cowlitz County Superior Court conviction of Velvet Faye Gibson for possession of the first batch of marijuana found in the living room; reversal of trial court's suppression order as to the second batch of marijuana found in the bedroom; remand for trial of Velvet Faye Gibson for possession of the second batch of marijuana.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The emergency exception recognizes the "community caretaking function of police officers, and exists so officers can assist citizens and protect property."
>
> But when the State invokes the emergency exception, "we must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search[.]" Thus, the exception may be invoked only when:
>
> > (1) The officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.
>
> We hold that the officers here were justified in entering the home and looking for Gibson after she disappeared for several minutes.
>
> The State relies upon State v. Angelos, 86 Wn. App. 253 (1997) **Sept 97 LED:12**. There, Officer Isaacson responded to a report that Angelos had overdosed on drugs. Officer Isaacson arrived at Angelos' apartment and entered the living room with emergency medical technicians. The officer overheard Angelos telling a medical technician that she had ingested cocaine through her nose and that her 12 year old daughter and two friends were at the apartment. Officer Isaacson found the daughter in her bedroom; the girl said that she "felt her mother had a prescription drug problem." Officer Isaacson asked her to look and see if any drugs were left out. She did so and reported that she found something in the bathroom. She took Officer Isaacson to the bathroom, where he found cocaine.
>
> The Angelos court upheld the initial entry into the apartment under the emergency exception even though medical personnel were already treating Angelos. The court reasoned that an officer's services might reasonably be "useful in coping with any circumstances, such as the presence of youngsters, that might otherwise be distracting to the medical technicians." The court noted that the officer's initial justification for entering the apartment did not necessarily

justify entering the bathroom once he knew Angelos was receiving medical treatment. But the court held that "[t]he emergency nature of each situation must be evaluated on its own facts, and in relation to the scene as it reasonably appeared to the officer at the time." The court upheld the bathroom search even though it was inconsistent with the motive of rendering assistance to Angelos because it was "entirely consistent with the officer's primary motive of protecting the three girls." Further, "[b]ecause the officer knew the mother had just overdosed, his immediate concern that drugs of some kind might be lying about in easy reach was fully justified."

Gibson attempts to distinguish Angelos, arguing that the emergency situation here was less urgent. She points out Angelos had overdosed on drugs, while she had merely used marijuana in the presence of minor children and was under the influence of that drug. She contends that the officers should have called for the children to step out of the house or asked her to bring them out. Gibson also suggests that the officers entered the home to investigate her drug use, not to ensure the children's safety.

But the officers had a legitimate concern for the children's safety. When they first entered the home, Gibson led the officers to a back bedroom and showed them some marijuana. During this time they also found the children and began arranging to get them out of the home. And even though Gibson had not overdosed like the defendant in Angelos, she was still under the influence of marijuana. The officers had a legitimate concern that she was unfit to care for the children and that the children may have had access to or been exposed to drugs.

And, as in Angelos, the officers' concerns continued even though the situation was at least partially under control. When Officer Cowan went looking for Gibson, she had been out of sight for three to five minutes. Officer Cowan knew that Gibson was distraught and under the influence of marijuana. The children were still in the house. Officer Cowan was concerned for the safety of everybody in the house. When he saw Gibson bent down with her hands out of view, he approached to investigate and discovered the second batch of marijuana. We hold that Officer Cowan was justified in conducting this second limited search because the exigent circumstances had not ended.

Furthermore, Officer Cowan did not have to call Gibson before he went looking for her. Gibson appeared to be under the influence of drugs. Whether she would have even answered a call is questionable. Of greater concern, she may have responded to such a call by doing something to harm herself, the children, or the officers. Finally, the trial court did not find that Officer Cowan searched for Gibson as a pretext to investigate the drug charge. The test is whether the exigent circumstances were continuing and, if so, whether the officer's conduct was aimed at controlling these circumstances. Here both parts of the test are satisfied.

[Some citations omitted]

PRO-STATE RULINGS ON SEIZURE-OF-PERSON, SEARCH-INCIDENT-TO-ARREST IN CASE INVOLVING LATE-NIGHT SPOTLIGHTING AND CONTACTING OF MAN IN PARKED CAR

State v. O'Neill, 104 Wn. App. 850 (Div. I, 2001)

Facts: (Excerpted from Court of Appeals opinion)

> At approximately 1:15 a.m. on June 7, 1999, Bellingham Police Sergeant Terry West drove by a closed supermarket that had been the target of recent burglaries and noticed a car with fogged windows parked in the supermarket's parking lot near a telephone booth. He pulled up approximately six to eight feet behind the car, illuminated it with a spotlight, and entered the car's license plate number into the police computer. After learning that the car recently had been involved in two drug offenses, Sergeant West approached the car but did not activate his emergency lights and did not draw his weapon. Sergeant West asked the man in the driver's seat of the car what he was doing parked at a closed business at that hour of the morning. The man, who police later learned was Matthew Glynn O'Neill, told Sergeant West that he had driven the car from Birch Bay and stopped to use the nearby payphone to call a friend. O'Neill explained that he was still there because his car would not start.
>
> After approximately one minute of conversation with O'Neill, Sergeant West concluded that "[t]here was nothing to indicate that a crime was going on." Nevertheless, Sergeant West asked O'Neill for identification. O'Neill informed Sergeant West that he had none, and admitted that he had been driving on a suspended driver's license. At Sergeant West's request, O'Neill attempted to start the car, albeit unsuccessfully. O'Neill then told Sergeant West that his name was Harold Macomber, the man to whom the car was registered. At this point, Sergeant West believed "that there was a possibility that [he] was dealing with somebody who was not who he said he was[,]" and was "concerned he wasn't getting a straight story." He therefore asked O'Neill to step out of the car for a pat-down search for identification. As O'Neill got out of the car, Sergeant West saw on the car's floorboard a spoon containing a granular substance, which he immediately recognized-based on his narcotics training and more than 20 years of experience as a police officer-to be a "cook spoon for narcotics." Sergeant West asked O'Neill if he could search the car. O'Neill initially refused and told Sergeant West that he would have to get a warrant. Sergeant West responded that he could arrest O'Neill for possession of drug paraphernalia and then conduct a search incident to that arrest. O'Neill continued to insist, for a while, that the officer needed a warrant to search the vehicle, but he ultimately consented, and Sergeant West searched the car, discovering a crack pipe and a baggie filled with cocaine. He arrested O'Neill for unlawful possession of cocaine and the State charged him accordingly.

Proceedings Below: The State charged O'Neill with possession of cocaine. O'Neill moved to suppress. The trial court granted the motion, ruling the officer needed reasonable suspicion to justify asking O'Neill for ID, and there was no such justification.

ISSUE AND RULING: 1) Did the officer "seize" O'Neill prior to the point when O'Neill admitted that he was driving on a suspended license? (ANSWER: No, rules a 2-1 majority, as the request for ID was not a constitutional "seizure" of the person; 2) Did the officer have authority to ask O'Neill to get out of his car? (ANSWER: Yes); 3) Was the search of the car a lawful search incident to arrest? (ANSWER: Yes)

Result: Reversal of Whatcom County Superior Court suppression; remand for trial.

ANALYSIS BY MAJORITY:

PRELIMINARY LED EDITORIAL NOTE: Ordinarily, we try to quote or at least fairly thoroughly describe search-and-seizure analysis in Washington appellate court decisions digested in the LED. But, in this case, we found the analysis in the lead opinion to be confusing and, in a few respects, clearly erroneous. Accordingly, for this decision, we will

very briefly and roughly describe the majority's analysis on the main issues, and we will supplement that analysis with a few editorial comments of our own.

1) "Seizure"

The lead opinion (by Judge Kennedy), concurring opinion (by Judge Cox) and the dissenting opinion (by Judge Becker) each address the question of whether a "seizure" occurred at the point when the officer asked O'Neill for ID, and the officer learned that O'Neill was driving on a suspended license. (The only question addressed in the concurring opinion by Judge Cox and the dissenting opinion by Judge Becker is the "seizure" question.) If the request for ID was a "seizure", then the seizure was unlawful, because the officer did not have reasonable suspicion to make a Terry seizure until O'Neill volunteered that he was driving on a suspended license.

The majority view of Kennedy and Cox is that an officer's request for ID to a person behind the wheel of his car under these circumstances (i.e., spotlighting followed by an ID request) does not convert a mere "contact" into a "seizure."

LED EDITORIAL COMMENT ON ISSUE 1: The lead opinion and concurring opinion analyze the "no-seizure" facts in relation to whether a reasonable person would feel free to leave under the circumstances. As to whether a request for ID in this circumstance is a "seizure," we think that the Court should have also noted that TWO major classes of police contacts are excluded from "seizure" status – those where a reasonable person would feel "free to leave" and those where a reasonable person would feel "free to decline" to talk to the officer. Under State v. Thorn, 129 Wn.2d 347 (1996) Aug 96 LED:13, the Washington Supreme Court ruled that no "seizure" occurs in a police contact where a reasonable, innocent person would feel free not to produce the ID or would feel free to decline to answer the officer's questions (even though the citizen might not feel free to leave). In our view, under the alternative "free to decline" standard of Thorn, it is even clearer than under the "free to leave" standard that no "seizure" occurred at the point when the officer asked O'Neill for ID.

2) Officer's request to O'Neill to get out of the vehicle

Judge Kennedy's analysis is confusing as to the officer's authority to ask O'Neill to get out of the vehicle. She seems to recognize that the officer had probable cause (based on O'Neill's response to the ID request) to make a custodial arrest of O'Neill for driving while suspended, and that he therefore could lawfully direct O'Neill to get out of the car. Judge Kennedy does not stop her discussion there, however. Instead, she then makes a brief reference to "search incident to arrest" doctrine, which discussion suggests that she erroneously thinks that authority to search following a lawful custodial arrest is not *per se* (i.e., she does not appear to recognize that, under this exception, the search authority is automatic and does not depend on whether the officer reasonably expects to find weapons or to find evidence connected to the crime for which arrest is made). Judge Kennedy also talks about the officer's intent to conduct a "pat-down search for identification," a phrase which may have come from the officer's report, but which does not have any connection to reality under Washington search and seizure law. And she later appears to suggest conclusorily that the officer decided at some point not to arrest O'Neill for the driving while suspended violation, but she offers no explanation to support that conclusion.

LED EDITORIAL COMMENT ON ISSUE 2: There is no such thing as a "pat-down search for identification" under Washington law. Also, authority to search incident to lawful custodial arrest is per se. At the point when the officer directed O'Neill to get out of this car, we think that the officer clearly had PC to arrest him for driving suspended, and, therefore, authority to search O'Neill's person and the passenger area of the car "incident to arrest." That "search incident" authority also justified directing O'Neill to get out of his car, we think.

But let's assume that there was: (A) some question about the officer's arrest or search authority; and (B) some question as to whether the officer decided at some point not to custodially arrest O'Neill for driving while suspended, and that the officer objectively manifested that intent to O'Neill, per State v. McKenna, 91 Wn. App. 554 (Div. II, 1998) Oct. 98 LED:05 (Judge Kennedy seems to suggest that the officer did decide not to arrest O'Neill, though Judge Kennedy does not explain why she might think that). Those assumptions would not make the officer's directive to O'Neill to get out of the car unlawful. That is because the officer had automatic authority under State v. Mendez, 137 Wn.2d 208 (1999) March 99 LED:04 to direct O'Neill, a vehicle operator, to get out of his vehicle, while the officer dealt with a possible law violation by the vehicle-operator-suspect.

3) Search of vehicle incident to arrest following arrest for possession of crack cocaine

Judge Kennedy primarily focuses on the officer's suspicion of a drug law violation in the "search incident" portion of her analysis. **She characterizes this as a "plain view" question, when, in fact, because the observation was made from outside the car, the observation comes under the "open view" rule** [**See February 2001 LED discussion of Lemus decision at pages 2-7].**

But her error is irrelevant. Because this case involved a vehicle occupied by a person subject to custodial arrest, what had been in "open view" became subject to "plain view" seizure when the officer entered the vehicle incident to arrest. Once a lawful custodial arrest is made of a vehicle occupant, the passenger area of the vehicle may be searched as a "search incident to arrest", as Judge Kennedy correctly notes. Judge Kennedy is also correct in noting that the officer's observation of a spoon with apparent drug residue in it gave the officer probable cause to arrest for possession of illegal drugs. And she is correct when she notes that mere possession of drug paraphernalia is not prohibited under chapter 69.50 RCW. She thus notes correctly that the officer was justified in arresting O'Neill for unlawful possession of drugs (and searching the vehicle incident to that arrest), but that the officer would not have been justified in arresting O'Neill for a "drug paraphernalia" law violation had the officer not spotted contraband residue in the spoon.

LED EDITORIAL COMMENT ON ISSUE 3: In addition to our critique in bold above re "plain view" vs. "open view," we wish to underscore our agreement with Judge Kennedy's point that mere possession of drug paraphernalia is not prohibited under chapter 69.50 RCW (note, however, that cities and counties are free to prohibit simple possession of drug paraphernalia by local ordinance and many do). Thus, for example, during a routine traffic stop, if an officer cannot actually see drug residue in a small-bowled pipe or bong inside the vehicle, then the officer does not have probable cause, under the state drug paraphernalia law, to arrest the possessor of the item. And the officer therefore does not have state-law authority, based on those assumed facts, to make a non-consenting entry into the vehicle to seize the item, unless a local ordinance makes mere possession of drug paraphernalia unlawful.

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BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

DESTRUCTION OF CO-OWNED, CO-POSSESSED COMMUNITY PROPERTY HELD NOT MALICIOUS MISCHIEF; DIVISION TWO BOTH DISTINGUISHES AND DISAGREES WITH DIVISION ONE'S WEBB DECISION -- In State v. Coria, __ Wn. App. __, 17 P.3d 1278 (Div. II, 2001), the Court of Appeals holds that defendant was unlawfully convicted of malicious mischief for destroying community property.

During a domestic dispute, Mr. Coria assaulted his wife. He also did about $620.00 in total damages to doors, a microwave, a TV, a mirror, a linoleum floor and a bird cage. These items were all located in the community residence that the couple shared. He was convicted in superior court on charges of second degree assault and second degree malicious mischief.

Division Two's Coria decision reverses the malicious mischief conviction, holding that it is not malicious mischief to destroy co-owned, co-possessed community property in which one spouse has no greater interest than the other spouse. The malicious mischief statutes in chapter 9A.48 RCW prohibit the malicious destruction of "property of another." The Coria Court explores in extended discussion the meaning of this term, finally concluding that co-owned, co-possessed community property in which spouses have equal interest cannot be "property of another".

Along the way, Division Two's opinion in Coria both distinguishes and disagrees with Division One's decision in State v. Webb, 64 Wn. App. 480 (Div. I, 1992) **Jan 93 LED:12**. In Webb, Division One held that defendant was lawfully convicted of malicious mischief for breaking into the apartment solely occupied by his wife from whom he was formally separated. The Webb Court had alternative rationales for its ruling. The Webb Court thus held: 1) that under the special facts of that case, the wife had a superior property interest to her husband under the formal separation, even though the vandalized personal property was still legally community property; and 2) even if such a superior property interest in the wife did not exist, malicious mischief is a crime different in nature from the crime of theft, and hence, while one cannot commit theft of community property where there is no superior property interest in either spouse, one can be guilty of malicious mischief in such a circumstance.

As noted, Division Two's Coria decision distinguishes Webb's first holding factually (because there was no superior property interest in the Coria case), and the Coria Court disagrees with the Webb Court's alternative second holding on the law (concluding that community property in which there is no superior interest cannot be "property of another" for purposes of the malicious mischief statutes).

Result: Reversal of Pierce County Superior Court conviction of Angel Coria for malicious mischief in the second degree; affirmance of conviction for second degree assault.

Status: The State is seeking review in the Washington Supreme Court; it will be several months before the Supreme Court makes a decision whether to grant review.

LED EDITORIAL NOTES: Division Two's Coria decision conflicts with Division One's Webb decision. Law enforcement agencies should check with their local prosecutors and legal advisors for advice on the issue addressed in Coria and Webb.

Also note that cities and counties are free to adopt local ordinances making destruction of community property malicious mischief at the misdemeanor and gross misdemeanor levels.

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NEXT MONTH

Among other entries in the May 2001 LED will be: (1) **Texas v. Cobb**, 2001 WL 309572 (decided April 2, 2001), where a 5-4 majority of the U.S. Supreme Court has ruled that the 6th Amendment right-to-counsel restriction on post-arraignment, police-initiated-contact with represented defendants does not limit police-initiated contacts with charged suspects on uncharged crimes that are "closely related" or even "inextricably intertwined" factually with the charged matter, unless those related crimes actually constitute the "same offense" as the charged crime;" and (2) **State v. Radan**, 2001 WL 287369 (decided March 22, 2001), where a 5-4 majority of the Washington Supreme Court has ruled: (A) that, while a discharge following a Montana felony conviction automatically restores the felon's firearms rights in Montana, such discharge does not automatically restore the Montana felon's firearms rights under Washington law; but (B) that an "early" discharge issued by the Montana Department of Corrections under the facts of this particular case qualified as a "certificate of rehabilitation (or its equivalent), thus restoring the Montana felon's rights under Washington law, RCW 9.41.040(4).

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INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND WAC RULES

The Washington office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address

is [http:www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated.

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990.

Easy access to relatively current Washington state agency administrative rules (including WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2001, can be found at [http://slc.leg.wa.gov/]. Information about bills filed in the 2001 Washington Legislature may be accessed at the following address: [http://www.leg.wa.gov] -- look under "bill info," "house bill information/senate bill information," and use bill numbers to access information. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The address for the Criminal Justice Training Commission's webpage is [http://www.wa.cjt], while the address for the Attorney General's Office webpage is [http://www/wa/ago].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at 206 464-6039; Fax 206 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to Kim McBride of the Criminal Justice Training Commission (CJTC) at (206) 835-7372; Fax (206) 439-3752; e mail [kmcbride@cjtc.state.wa.us]. **LED** editorial comment and analysis of statutes and court decisions expresses the thinking of the writers and does not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED**'s from January 1992 forward are available via a link on the Commission's Internet Home Page at:[http://www.wa.gov/cjt].